No. 1-10-0336

FIRST DIVISION
FILED: January 24, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VIOLETTA HOWARD and RICHARD HOWARD,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
Plaintiffs-Appellants,	)	
v.	)	No. 09 L 10375
GEORGE CYBULSKI, M.D., and SRDJAN MIRKOVIC, M.D., each individually and as agents, servants and/or employees of NORTHWESTERN MEMORIAL HOSPITAL, a corporation,	)	HONORABLE RONALD S. DAVIS, JUDGE PRESIDING.
Defendants-Appellees.	)	

JUSTICE HOFFMAN delivered the judgment of the court. Presiding Justice Hall and Justice Lampkin concurred in the judgment.

O R D E R

HELD: The circuit court erred in dismissing the plaintiffs' refiled complaint based on *res judicata* where the prior grant of partial summary judgment on a single count of negligence, which was premised on the evidentiary principle of *res ipsa loquitur*, did not constitute a final disposition of the plaintiffs' claim for negligence; the circuit court did not abuse

its discretion in ordering the plaintiffs to pay 50% of the deposition fee of a non-treating physician.

The plaintiffs, Violetta Howard and Richard Howard, brought this action against the defendants, George Cybulski, M.D., and Srdjan Mirkovic, J.D., individually and as agents, servants and/or employees of Northwestern Memorial Hospital, seeking recovery for damages allegedly sustained as a result of the negligent medical treatment of Violetta. After ordering that the plaintiffs pay 50% of the discovery deposition fee of a non-treating physician, the circuit court dismissed the action based on a finding that it was barred by the doctrine of *res judicata*. For the reasons that follow, we affirm in part, reverse in part, and remand the cause to the circuit court for further proceedings.

The record established the following undisputed facts. On September 15, 2004, the plaintiffs filed a three-count complaint, seeking recovery for damages sustained as a result of the defendants' negligent performance of surgery on Violetta in September 2002. Count 1 of the complaint asserted that the negligence of the defendants was established based on the evidentiary principle of *res ipsa loquitur*. Count 2 asserted that the negligence of the defendants was premised on specific acts of negligent medical treatment. In particular, count 2 alleged that the defendants breached the duty of care owed to Violetta by (1)

operating on her without taking into account her anatomical vertebral anomaly, (2) operating on a level other than C5-C6, causing damage to a nerve root at C8-T1, and (3) improperly positioning her prior to the surgery, leading to an ulnar neuropathy that resulted in a "claw hand." In count 3, Richard sought recovery for loss of consortium with Violetta as a result of the defendants' medical negligence.

The defendants subsequently moved for partial summary judgment on the negligence claim premised on *res ipsa loquitur* alleged in count 1. The plaintiffs did not oppose this motion, and the circuit court entered partial summary judgment in favor of the defendants on this count. The order granting the defendants' motion included language indicating that it was "final and appealable pursuant to Supreme Court Rule 304(a)." Thereafter, the cause proceeded on the remaining negligence and loss of consortium claims, as alleged in counts 2 and 3 of the complaint.

During discovery, the plaintiffs named Dr. Martin Dauber as a rebuttal witness pursuant to Supreme Court Rule 213 (f)(2) (Ill. S. Ct. R. 213(f)(2) (eff. Jan. 1, 2007)). Dr. Dauber's discovery deposition was taken at the offices of Dr. Mirkovic's attorney, pursuant to a subpoena requested by the plaintiffs' counsel. Correspondence between the plaintiffs' counsel and Dr. Dauber reflects that the plaintiffs' attorney acknowledged that the bill

for Dr. Dauber's deposition fee should be sent to him.

On September 2, 2008, the plaintiffs voluntarily dismissed the two remaining counts of their complaint pursuant to section 2-1009 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1009 (West 2008)). The court's order provided that those claims were dismissed "without prejudice and with leave to re-file, costs having been tendered and waived unless re-filed and to be paid upon re-filing per agreement."

On September 2, 2009, the plaintiffs timely refiled the action under section 13-217 of the Code (735 ILCS 5/13-217 (West 2008)). The refiled complaint consisted of two counts and sought recovery for negligence based on the specifically alleged acts of negligent medical treatment, as set forth in count 2 of the previous complaint, and for loss of consortium, as alleged in count 3 of the prior complaint.

During the pendency of this action, the plaintiffs filed a motion requesting that the defendants be ordered to pay Dr. Dauber's deposition fee, in accordance with Supreme Court Rule 204(c) (Ill. S. Ct. R. 204(c) (eff. June 11, 2009). The circuit court ruled that the plaintiffs and the defendants were jointly responsible for the cost of taking Dr. Dauber's deposition and ordered that they each bear 50% of his fee.

The defendants filed a motion to dismiss the action pursuant

to section 2-619 of the Code (735 ILCS 5/2-619 (West 2008)), asserting that the plaintiffs' claims were barred under the doctrine of *res judicata* and violated the prohibition against claim-splitting. The circuit court agreed and granted the defendants' motion to dismiss with prejudice.

The plaintiffs have appealed the dismissal of their 2009 complaint, asserting claims for negligence and loss of consortium, as well as the circuit court's order requiring them to pay 50% of Dr. Dauber's deposition fee.

We initially address the plaintiffs' argument that the circuit court erred in dismissing their refiled complaint on the ground of *res judicata*. Our review of a dismissal under section 2-619 is *de novo*. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59, 857 N.E.2d 229 (2006). Further, the determination of whether a claim is barred under the doctrine of *res judicata* is a question of law, which we review *de novo*. *Arvia v. Madigan*, 209 Ill. 2d 520, 526, 809 N.E.2d 88 (2004).

Res judicata is an equitable doctrine designed to prevent multiple lawsuits between the same parties where the facts and issues are the same. *Murneigh v. Gainer*, 177 Ill. 2d 287, 299, 685 N.E.2d 1357 (1997). Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties

or their privies on the same cause of action. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467, 889 N.E.2d 210 (2008); *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334, 665 N.E.2d 1199 (1996). *Res judicata* bars not only what was actually decided in the first action, but also whatever could have been decided. *Hudson*, 228 Ill. 2d at 467. Three requirements must be satisfied for *res judicata* to apply: (1) the rendition of a final judgment on the merits by a court of competent jurisdiction; (2) the existence of an identity of cause of action; and (3) the parties or their privies are identical in both actions. *Hudson*, 228 Ill. 2d at 467.

In addition, Illinois courts also generally follow a rule against claim-splitting. See *Rein*, 172 Ill. 2d at 340; *Best Coin-Op, Inc. v. Paul F. Ilg Supply Co.*, 189 Ill. App. 3d 638, 657, 545 N.E.2d 481 (1989). Under this rule, where a cause of action is in its nature entire and indivisible, a plaintiff cannot divide it in order to maintain separate lawsuits. *Best Coin-Op, Inc.*, 189 Ill. App. 3d at 657. As a matter of public policy, a plaintiff is not permitted to sue for part of a claim in one action and then sue for the remainder in another action. *Rein*, 172 Ill. 2d at 340; *Best Coin-Op, Inc.*, 189 Ill. App. 3d at 657.

The plaintiffs do not dispute that there is an identity of the cause of action and of the parties in the 2004 and the 2009 actions, establishing that the second and third requirements of *res*

judicata have been satisfied in this case. They assert, however that the first element has not been met because their negligence claim had not been finally adjudicated on the merits prior to the voluntary dismissal of the remaining counts in the 2004 complaint. We must agree.

"A judgment or order is 'final' if it disposes of the rights of the parties, either on the entire case or on some definite and separate part of the controversy." *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 502, 687 N.E.2d 871 (1997). For an order to dispose of a separate part of a controversy, the bases for recovery of the counts which are determined must be different from those that remain pending. *Heinrich v. Peabody International Corp.*, 99 Ill. 2d 344, 348, 459 N.E.2d 935 (1984); *Piagentini v. Ford Motor Co.*, 387 Ill. App. 3d 887, 894, 901 N.E.2d 986 (2009). This circumstance exists when the grounds for recovery under the various counts arise from different statutes or common law doctrines or when different elements are required to recover under different theories. *Heinrich*, 99 Ill. 2d at 348; *Rice v. Burnley*, 230 Ill. App. 3d 987, 991, 596 N.E.2d 105 (1992). The dismissal of certain allegations under a single theory of recovery does not terminate litigation between the parties on the merits or dispose of the rights of the parties on a separate branch of the controversy. *Piagentini*, 387 Ill. App. 3d at 894, citing *Rice*, 230

Ill. App. 3d at 992-93. Rather, the dismissal of certain allegations under one theory of recovery merely determines which allegations under that theory are allowed to remain. *Piagentini*, 387 Ill. App. 3d at 894.

In this case, the circuit court entered partial summary judgment in favor of the defendants on count 1, which was premised on the principle of *res ipsa loquitur*. However, *res ipsa loquitur* is not a separate theory of recovery, but is a rule of evidence that gives rise to an inference or presumption of negligence by circumstantial evidence. *Rice*, 230 Ill. App. 3d at 992, citing *Metz v. Central Illinois Electric & Gas Co.*, 32 Ill. 2d 446, 448-50, 207 N.E.2d 305 (1965); see also *National Tea Co. v. Gaylord Discount Department Stores, Inc.*, 100 Ill. App. 3d 806, 809, 427 N.E.2d 345 (1981). Counts 1 and 2 of the 2004 complaint both sought recovery for negligence and required proof of the same elements: duty, breach, and injury proximately resulting from the breach. See *Rice*, 230 Ill. App. 3d at 992. Although the partial summary judgment on count 1 precluded the plaintiffs from proving negligence under the principle of *res ipsa loquitur*, that order did not finally resolve their negligence claim because count 2, alleging specific acts of negligent conduct, remained pending. Therefore, the partial summary judgment did not dispose of the rights of the parties on the entire case or on some definite and

separate part thereof. See *Dubina*, 178 Ill. 2d at 502; *Heinrich*, 99 Ill. 2d at 348; *Piagentini*, 387 Ill. App. 3d at 894; *Rice*, 230 Ill. App. 3d at 991. Rather, it was merely a ruling by the trial judge that the facts would not support a presumption of negligence. See *Rice*, 230 Ill. App. 3d at 992; *National Tea Co.*, 100 Ill. App. 3d at 809. In reaching this conclusion, we note that the inclusion of a Rule 304(a) finding in the order granting the partial summary judgment did not transform that ruling into a final judgment on the merits. See *In re Adoption of Ginnell*, 316 Ill. App. 3d 789, 793, 737 N.E.2d 1094 (2000) (recognizing that Rule 304(a) language does not make an order final, but makes appealable a final order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties in an action).

In urging us to affirm the dismissal of the plaintiffs' 2009 complaint on the basis of *res judicata*, the defendants contend that this case is governed by the supreme court's decisions in *Hudson* and *Rein*. This argument is unpersuasive.

In *Hudson*, the plaintiffs' negligence claim was dismissed in its entirety before the voluntary dismissal of their claim for willful and wanton misconduct. *Hudson*, 228 Ill. 2d at 465-66. In *Rein*, all of the plaintiffs' claims for statutory rescission were dismissed with prejudice prior to the voluntary dismissal of their common-law claims. *Rein*, 172 Ill. 2d at 329-30. In both *Hudson*

and *Rein*, the supreme court held that a plaintiff who splits his claims by voluntarily dismissing and refiling part of an action after a final judgment has been entered on another part of the case subjects himself to a *res judicata* defense. *Hudson*, 228 Ill. 2d at 473; *Rein*, 172 Ill. 2d at 337-39. We find that the reasoning employed in *Hudson* and *Rein* does not apply in this case because, as explained above, the partial summary judgment on count 1 did not constitute a final adjudication of the plaintiffs' negligence claim.

Relying on the principle that the voluntary dismissal of all pending claims terminates the litigation in its entirety, rendering prior final orders immediately appealable (see *Hudson*, 228 Ill. 2d at 468, citing *Dubina*, 178 Ill. 2d at 503), the defendants maintain that the partial summary judgment on the *res ipsa loquitur* count became a final judgment when the circuit court granted plaintiffs' motion to voluntarily dismiss the remaining counts of the 2004 complaint. However, contrary to the defendants' assertion, we find no authority for the proposition that a nonfinal order becomes final upon voluntary dismissal of a suit. See *Piagentini*, 387 Ill. App. 3d at 895, citing *Jackson v. Victory Memorial Hospital*, 387 Ill. App. 3d 342, 900 N.E.2d 309 (2008), *superseded by statute on other grounds as stated in Knight v. Van Matre Rehabilitation Center, LLC*, 404 Ill. App. 3d 214, 936 N.E.2d 1152, 1155 (2010).

Accordingly, the defendants' argument is in direct conflict with the rule articulated in *Hudson* and *Rein*, which provides that the doctrine of *res judicata* will bar a subsequent action to litigate unresolved claims that were voluntarily dismissed *after* part of the plaintiff's cause of action has proceeded to final judgment. *Hudson*, 228 Ill. 2d at 473; *Rein*, 172 Ill. 2d at 337-39. Here, the voluntary dismissal did not occur following the entry of a final judgment because the plaintiffs' negligence claim, as specifically alleged in count 2, remained pending; prior to the voluntary dismissal of the 2004 complaint, none of the plaintiffs' claims had been finally disposed.

Moreover, we observe that, even if the partial summary judgment on count 1 could be construed as a final adjudication on the merits, the plaintiffs' right to refile their specific negligence and loss of consortium claims was preserved by an exception to the prohibition against claim-splitting. As set forth in section 26(1) of the Restatement (Second) of Judgments (1982), a second action will not be barred if "the court in the first action expressly reserved the plaintiff's right to maintain the second action" (Restatement (Second) of Judgments § 26(1)(b), at 233 (1982)). See generally *Hudson*, 228 Ill. 2d at 472; *Rein*, 172 Ill. 2d at 341. The supreme court has noted that merely including the phrase "without prejudice" in an order granting a voluntary

dismissal is insufficient to protect a plaintiff against the bar of *res judicata* when another part of the plaintiff's case has been finally adjudicated in a prior action. *Hudson*, 228 Ill. 2d at 472 n. 2. In this case, however, the circuit court's order granting the plaintiffs' motion to voluntarily dismiss the remaining counts of the 2004 complaint specifically stated that those claims were dismissed "without prejudice and with leave to re-file, costs having been tendered and waived unless re-filed and to be paid upon re-filing per agreement." This language definitively reserved the plaintiffs' right to refile their specific negligence and loss of consortium claims, triggering the exception to the rule against claim-splitting. See *Severino v. Freedom Woods, Inc.*, No. 1--09-2778, slip op. at 19-20 (Ill. App. Dec. 3, 2010); *Green v. Northwest Community Hospital*, 401 Ill. App. 3d 152, 155, 928 N.E.2d 550 (2010); *Quintas v. Asset Management Group, Inc.*, 395 Ill. App. 3d 324, 333, 917 N.E.2d 100, 107 (2009). For all of the reasons set forth above, *res judicata* does not apply to bar the plaintiffs' negligence and loss of consortium claims, and the circuit court erred in dismissing their 2009 complaint with prejudice.

We next consider the plaintiffs' argument that the circuit court erred in requiring them to pay 50% of Dr. Dauber's deposition fee. In support of this argument, the plaintiffs rely principally upon the language of Supreme Court Rule 204(c), which is a

discovery rule, the purpose of which is to enable attorneys to better prepare and evaluate their cases. *Montes v. Mai*, 398 Ill. App. 3d 424, 428, 925 N.E.2d 258 (2010). A trial court's order concerning a discovery matter will not be disturbed on appeal without an affirmative and clear showing by the appellant that the court has abused its discretion. See *Montes*, 398 Ill. App. 3d at 429. A reviewing court will find an abuse of discretion only where no reasonable person would adopt the circuit court's view. *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 331, 887 N.E.2d 878 (2008).

Rule 204(c) states, in pertinent part, as follows:

> "A party shall pay a reasonable fee to a physician for the time he or she will spend testifying at any such deposition. Unless the physician was retained by a party for the purpose of rendering an opinion at trial, *or unless otherwise ordered by the court*, the fee shall be paid by the party at whose instance the deposition is taken." (Emphasis added.) (Ill. S. Ct. R. 204(c) (eff. June 11, 2009).

Thus, the plain language of the rule allows exceptions to the general rule that the party at whose instance the deposition is taken should bear the cost. *Vicencio v. Lincoln-Way Builders, Inc.*, 204 Ill. 2d 295, 309, 789 N.E.2d 290 (2003); *Woolverton v.*

McCracken, 321 Ill. App. 3d 440, 442-43, 748 N.E.2d 327 (2001). This express allowance permits a circuit court, under appropriate circumstances, to order that the fee for a physician's discovery deposition should not be borne exclusively by the party at whose instance the deposition was taken. See *Vicencio*, 204 Ill. 2d at 309-10 (recognizing that "there are some circumstances, such as those contemplated by Rule 219(e), under which it would be within the discretion of the trial court to order that a treating physician's reasonable fee be taxed as a cost").

In this case, the record reflects that, although Dr. Dauber was not retained as an opinion witness on behalf of the plaintiffs, he was consulted by the plaintiffs' attorney on the issue of whether he had any opinions regarding the anesthesia care rendered to Violetta. At the plaintiffs' request, Dr. Dauber reviewed the relevant records of Violetta's surgical procedures. In addition, the plaintiffs' counsel caused a subpoena to be issued for Dr. Dauber's appearance at the discovery deposition, and Dr. Dauber issued an engagement letter, detailing his professional fees for such appearance, to the plaintiffs' attorney. The plaintiffs' counsel acknowledged that the bill for Dr. Dauber's appearance at the deposition should be sent to him. Under these circumstances, we cannot say that the circuit court abused its discretion in ordering that the plaintiffs and defendants equally share the cost

of Dr. Dauber's deposition fee.

For the foregoing reasons, the circuit court's order requiring the plaintiffs to pay 50% of Dr. Dauber's deposition fee is affirmed; the dismissal of the plaintiffs' negligence and loss of consortium claims with prejudice is reversed, and the cause is remanded to the circuit court for further proceedings.

Affirmed in part, reversed in part, and remanded.